DATUK BANDAR DEWAN BANDARAYA KUALA LUMPUR

v.

ONG KOK PENG & ANOR.

SUPREME COURT, KUALA LUMPUR
DATUK MOHD JEMURI BIN SERJAN CJ (BORNEO), TAN SRI DATO' HJ. MOHD AZMI BIN DATO' HJ. KAMARUDDIN & DATO' PEH SWEE CHIN SCJJ
[SUPREME COURT APPEAL NO. 02-47-1992]
5 APRIL 1993

TORT: Occupiers or owners liability for dangerous premises at common law - Standard of duty of care owed to licensee - Accident caused by falling down lift shaft - Lift to be maintained by independent contractor - Whether owner or independent contractor liable for damages.

The respondent had suffered severe injuries as a result of falling into a lift shaft in a block of flats owned by the appellant. The respondent had steped into the lift shaft on seeing the lift door partly open, there being no warning sign or barricade of any sort placed at the lift door to indicate that the lift was not in service.

The maintenance of the lifts was covered by a maintenance agreement between the appellant and the third party and the appellant sought an indemnity from the third party for damages awarded to the respondent. The trial Judge gave judgment against the appellant and dismissed the appellant's claim against the third party holding that the respondent was an invitee of the appellant and as such the appellant owed a duty of care to the respondent.

On appeal the determination of the Court was sought on the standard of care owed to a licensee.

Held:

[1] A licensee must take the premises as he finds them and the duty owed is not to expose him to hidden perils and to warn him of existing traps or concealed danger.

[2] The respondent fell through a lift door which was partly open and there was no warning of any kind about the danger as the lift was out of order and neither was there any barricade of any kind. This was created by such an extra hazardous act or omission involving special danger to users of that lift that the appellant could not escape liabilty for the injuries caused to the respondent.

[3] The maintenance of the lift was a statutory duty imposed on the appellant by the Factory and Machinery Act 1967 and the appellant could not escape liability by delegating it to the third party.

[4] The failure of the third party to erect any warning signs in respect of the defective lift was in breach of the contractual obligations to erect such warning signs under clause 4 of the maintenance agreement and as the third party had expressly agreed under clause 14 of the agreement to indemnify the appellant for damages for accidents at common law, the appellant was clearly entitled to indemnity from the third party in respect of the damages payable by the appellant to the respondent.

[5] The third party was also negligent in respect of the failure in erecting such warning signs, before the date of the accident, from the moment it came to know or ought to have known of the trap or hidden danger created by the defective lift.

[Judgment given in favour of respondent confirmed. Judgment and costs in favour of third party reversed and judgment with costs entered against third party in favour of appellants].

[**Bahasa Malaysia** Translation of Headnote]

TORT: Liabiliti penghuni-penghuni atau pemunya-pemunya bagi premis merbahaya pada undang-undang common - Standard kewajipan berjaga-jaga yang patut diberikan kepada pemegang lesen - Kemalangan berlaku kerana jatuh ke dalam lubang lif - Lif sepatutnya diselenggara oleh kontraktor bebas - Sama ada pemunya atau kontraktor bebas bertanggungjawab bagi kerugian.

Responden telah mengalami kecederaan yang teruk akibat terjatuh ke dalam lubang lif dalam satu blok rumah pangsa yang dimiliki oleh perayu. Responden telah menjejakkan kaki ke dalam lubang lif apabila melihat pintu lif terbuka sedikit dan tiada terdapat apa-apa amaran atau apa-apa bentuk penghalang diletakkan di pintu lif untuk menunjukkan bahawa lif tidak boleh digunakan.

Penyelengaraan lif termaktub dalam perjanjian penyelenggaraan yang dibuat di antara perayu dan pihak ketiga dan perayu memohon suatu tanggung rugi daripada pihak ketiga untuk gantirugi yang diawadkan kepada responden. Hakim perbicaraan memberikan penghakiman menentang perayu dan menolak tuntutan perayu terhadap pihak ketiga dengan memutuskan bahawa responden ialah seorang yang dijemput oleh perayu dan oleh yang demikian perayu mempunyai kewajipan berjaga-jaga kepada responden.

Atas rayuan, keputusan Mahkamah telah dipohon ke atas standard berjaga-jaga yang patut diberikan kepada seorang pemegang lesen.

Diputuskan:

[1] Seorang pemegang lesen mestilah mengambil premis sebagaimana yang didapati olehnya dan kewajipan yang patut diberikan ialah untuk tidak mendedahkannya kepada bahaya yang tersembunyi dan memberi amaran mengenai perangkap-perangkap yang ada atau bahaya tersembunyi.

[2] Responden telah jatuh melalui lubang lif yang terbuka sedikit dan tiada apa-apa jua amaran atau pun apa-apa bentuk halangan mengenai bahaya bahawa lif tidak boleh dipakai. Ini adalah disebabkan oleh tindakan kemudaratan atau peninggalan yang melibatkan bahaya khas kepada pengguna-pengguna lif tersebut di mana perayu tidak boleh lari daripada liabiliti bagi kecederaan yang disebabkan kepada responden.

[3] Penyelenggaraan lif adalah suatu kewajipan statutori yang dikenakan ke atas perayu oleh Akta Perkilangan dan Jentera 1967 dan perayu tidak boleh lari daripada liabiliti dengan memindahkannya kepada pihak ketiga.

[4] Kegagalan pihak ketiga untuk meletakkan apa-apa tanda amaran berhubung dengan lif yang rosak tersebut adalah melanggar obligasi kontraktual untuk meletakkan tanda amaran yang sedemikian di bawah fasal 4 perjanjian penyelenggaraan dan memandangkan pihak ketiga dengan jelas bersetuju di bawah fasal 14 perjanjian tersebut untuk menanggung rugi perayu bagi gantirugi untuk kemalangan pada undang-undang common, perayu adalah jelas berhak kepada tanggung rugi daripada pihak ketiga berhubung dengan gantirugi yang kena dibayar oleh perayu kepada responden.

[5] Pihak ketiga juga cuai berhubung dengan kegagalan dalam meletakkan tanda amaran yang sedemikian, sebelum tarikh kemalangan tersebut, mulai dari saat ia diketahui atau mengetahui akan perangkap atau bahaya tersembunyi yang disebabkan oleh lif yang rosak.

[Penghakiman yang diberikan memihak kepada responden disahkan. Penghakiman dan kos yang memihak kepada pihak ketiga dibatalkan dan penghakiman dengan kos dicatatkan terhadap pihak ketiga memihak kepada perayu].

Cases referred to:

Fairman v. Perpetual Building Society [1923] AC 74 ***(refd)***
Latham v. Johnson [1913] 1 KB 399 ***(refd)***
Bower v. Peat [1876] 1 QBD 321 ***(refd)***
Tarry v. Ashton [1876] 1 QBD 314 ***(refd)***
Wilsons & Clyde Coal Co. v. English [1930] AC 57 ***(refd)***
Salsbury v. Woodland [1970] 1 QB 324 ***(refd)***
Honeywill Stein Ltd. v. Larkin Brothers Ltd. [1934] 1 KB 191 ***(refd)***

Legislation referred to:

Factory and Machinery Act 1967, ss. 14, 15 and 21
Occupier's Liability Act 1957 (UK)

For the appellant - Zainur bin Zakaria; M/s. Zainur Zakaria & Co.
For the first respondent - R.K. Nathan; M/s. R.K. Nathan & Co.
For the second respondent - Dulip Singh; M/s. Dulip Singh & Co.

JUDGMENT

Peh Swee Chin SCJ:

The High Court has earlier at the first instance given judgment against the defendant by allowing the claim of plaintiff against the defendant and dismissing the defendant's claim against the third party. On appeal to us against the said judgment, we have allowed the appeal of the defendant to the extent that the judgment and costs given by the High Court in favour of the plaintiff be confirmed but that the judgment and costs given by the High Court in favour of the third party be reversed by entering judgment with costs in favour of the defendant against the third party instead. We indicated we would give our reasons in writing and we now hereby do so.

This case concerns one of those lift accidents, which have been on the increase with usually serious injuries to persons involved, brought about by a very notable change of lifestyle caused by shortage of town land, and hefty increase of urban population leading to mushrooming of construction of high-rise blocks of flats and similar structures incorporating lifts for the use of such flat-dwellers.

The facts could be summarized as follows.

At about 6.00 a.m. on 29 April 1980, the plaintiff, a taxi driver wanted to collect some keys from a friend living at Block B, Pekeliling Flats at Jalan Pekeliling, Kuala Lumpur, the latter apparently a tenant at the Pekeliling Flats which together with lifts inside them were owned by the Dewan Bandaraya, Kuala Lumpur of which the defendant was its Datuk Bandar. He wanted to use the lift and pressed the lift button. He tried all the three lifts there on the ground floor but no lift came after about 5 minutes. He then decided to walk up the staircase and found every lift door closed on 1st, 2nd, 3rd and 4th floors. On reaching the 5th floor, he saw a lift door open partly for about one foot wide. There were lights at the staircase but none at that lift about 12 feet away from the staircase and it was bright enough to see the lift door. He opened the lift door and stepped in and fell straight down the shaft, there was no lift inside the door.

There was no warning sign of any sort or any guard or barricade put up then at the lift door about the lift being out of order.

The plaintiff was badly injured and at the trial all parties agreed on the damages being fixed at RM30,000 at the outset of trial subject to proof of liability.

In respect of the particular lift, it was covered by an agreement for maintenance of lifts in Pekeliling Flats made between the defendant and the third party for a period during which the accident took place. Under the agreement, the 3rd party was paid RM180 per month for maintaining each of the lifts, and it emerged in evidence that in case of major repairs or replacement of parts costing more than RM300 (as involved in the instant case), the third party had to submit quotations to the Dewan Bandaraya and "local orders" had to be given by the defendant before such work could be commenced.

The lifts, as far as all the parties herein were concerned were under the control and management of and to be maintained by the defendant at the cost of the defendant.

Further the third party agreed to carry out its work "according to a reasonable working capability..." the wording is clumsy and not quite English, but the meaning is clear enough, that is, reasonable skill. The third party further agreed to arrange for insurance for, among other things, damages "under the Common Law ..." for accidents arising out of the work in connection with the agreement and if the third party failed to do so, such damages etc. could be recovered from the third party itself by the defendant.

Further, clause 4 of the maintenance agreement, stated:- "whenever there is a lift breakdown and which the contractor is examining or maintaining or undertaking any other work, the contractor must display at every landing door of the lift, a notice or a cordon or a reasonable signboard indicating that the particular lift is out of order".

It was not disputed that an officer from Jabatan Kilang and Jentera, Kuala Lumpur had on 10 October 1979 written a warning letter to the defendant pointing out the defects of all the three lifts there, which were required to be rectified by replacements of defective parts with new parts, including all landing doors of all lifts, all within 6 months, failing which the defendant would not be allowed to operate the lifts anymore.

The "local orders" for the defects were received quite late by the third party, but at any rate before the date of accident on 29 April 1980, by then, also 6 months after the Inspector of Machinery's letter aforesaid.

The learned trial Judge gave judgment for the plaintiff against the defendant but dismissed the claim for indemnity against the third party, holding, as his Lordship apparently agreed with Counsel's submission, that the plaintiff was an invitee of the defendant and that the defendant owed a duty of care to him and briefly put, in regard to the third party, the defendant failed to give approval (that is, the local orders aforesaid) promptly or early despite the letter from the Inspector of Machinery aforesaid, and it was only on 21 April 1980 that the "local orders" or

instructions to proceed reached the third party who should therefore not be blamed.

While we agreed with the judgment against the defendant in favour of the plaintiff, we were unable to agree with the judgment in favour of the third party against the defendant.

The instant case belongs to the realm of liability of occupier or owner for dangerous premises at common law. For better understanding the position, we use the expression, "occupier" hereinafter.

It is important to point out immediately that the common law as regards the liability of occupier of dangerous premises (including land, buildings and structures) still applies wholly to Malaysia but much of it has been modified in Britain's Occupier's Liability Act 1957, which was intended to improve and modify the common law, e.g. and *inter alia* by abolishing the distinction between an invitee and a licensee. Cases decided in Britain under the Occupier's Liability Act, 1957 therefore since its enforcement in Britain, would tend to be misleading in Malaysia and ought to be eschewed in favour of pre-1957 cases there for our use and reference.

In this judgment therefore, we would mainly rely on such pre-1957 cases unless when it is in order to resort to post-1957 cases when a particular part of the common law has remained intact and unscathed.

Speaking of plaintiffs entering premises, the liability of occupiers of such premises to take care exists but it depends on the character in which they have entered them. First, we have people who enter them by virtue of a contract, such as a guest in a hotel, secondly we have people who enter them on business of interest, both to such persons as well as the occupiers, e.g. a customer going into a shop to view the goods, they are the invitees; thirdly we have persons who enter them with the express or implied permission of the occupiers, without neither a contract, nor such community of interest, they are called licensees and fourthly, there are persons who enter as trespassers. In the order we have mentioned such persons, the duty of care is cast in a descending scale, the highest duty of care being towards persons who enter the premises by virtue of a contract down and not so high in the case of invitees and so on. Such duty of care has been spelt out at common law in each case.

The plaintiff entered the lift not at all on business of common interest to the Datuk Bandar, *viz.* the defendant and to himself, but definitely with implied permission from the defendant. It must be borne in mind that he was injured at the lift or rather in the shaft of the lift, the lift being under the occupation or possession legally of the defendant, maintained or controlled by the defendant for the benefit of the tenants of the flats there, who when using the lifts, were invitees of the defendant, the plaintiff was a licensee of the defendant, at the lift and its immediate vicinity. Thus a lodger staying with a tenant was held to be an invitee of the tenant but a licensee of the landlord in *Fairman v. Perpetual Building Society* [1923] AC 74.

What then is the standard of such duty of care owed to a licensee? A licensee must take the premises as he finds them, and the duty owed is not to expose him to hidden perils, and to warn him of existing traps or concealed danger, *Fairman supra.* A trap, as stated by Hamilton, LJ in *Latham v. Johnson* [1913] 1 KB 399 is something which sometimes involves "the appearance of safety under circumstances cloaking a reality of danger".

The lift door was partly open or ajar for about 1 foot. There was no warning of any kind about the danger as the lift was out of order, neither was there any barricade of any kind. There was even no light just outside the lift door, there was no lift inside and the plaintiff could have also stepped into eternity (pardon our metaphor), the features in the instant were classic of the appearance of safety under circumstances cloaking a reality of danger.

If the independent contractor, that is, the third party in this case was not involved, then there could not be the slightest doubt that the Datuk Bandar, i.e. the defendant was liable. However it was repeatedly submitted that the defendant was not liable for default or negligence of his independent contractor whom the defendant chose and whose competence was not disputed by any party. Could therefore the blame for the plaintiff's misfortune be shifted on to the shoulders of the defendant's independent contractor in the circumstances of this case?

While the rule that an employer of an independent contractor is not liable for the default or

negligence of such contractor no doubt exists, there are exceptions, and it is outside the province of this judgment to elaborate all the exceptions but only briefly to deal with them except those which are directly concerned with the instant case.

First exception is where an employer has not exercised care in selecting a competent contractor as was much pressed in argument in the present case. Second exception is a group of cases or situations when the duty to take care is said to be "non-delegable". A non-delegable duty to take care means in effect that the employer would have to see to it that such duty of care is exercised, whether by his contractor or not, otherwise he would be equally liable as the contractor, in addition, in most cases, to the liability of his contractor. Such non-delegable duty exists in the case of work causing withdrawal of support to neighbour's land, see *Bower v. Peat* [1876] 1 QBD 321; work done on a highway, see *Tarry v. Ashton* [1876] 1 QBD 314; cases of a master's duties for his servant's safety at common law, see *Wilsons & Clyde Coal Co. v. English* [1930] AC 57; cases of strict liability and finally cases of statutory duty imposed on certain categories of persons.

The last two mentioned exceptions require elaboration as they have considerable relevance to our instant case.

The exception in regard to cases of strict liability above mentioned refers to cases of such strict liability at common law, such as the rule in *Rylands v. Fletcher*. The exception covers, *inter alia*, all cases involving extra hazardous acts or omissions, or situations created by them, which all involve special danger to others, please see the reference to them e.g. in *Salsbury v. Woodland* [1970] 1 QB 324, such as damage by fire, see *Honeywill Stein Ltd. v. Larkin Brothers Ltd.* [1934] 1 KB 191 so that an employer of an independent contractor, to repeat, cannot escape liability by delegating the work to such independent contractor.

In our view, the situation described earlier as facing the plaintiff was a situation created by such an extra hazardous act or omission involving special danger to such users of that lift. The defendant could not escape such liability entrusted to or by entrusting to the third party. That is why we confirmed the judgment of the High Court against the defendant in favour of the plaintiff for this reason alone.

The defendant would also be liable in any event, for a different reason, that the last mentioned exception about statutory duty applied to this case. The maintenance of lift was also a statutory duty imposed on defendant by the Factory and Machinery Act 1967. The defendant cannot also for the reason escape liability by delegating it to the third party, his independent contractor. Please see, e.g. ss. 14, 15 and 21 of this Act.

The breach of duty of not exposing the plaintiff to and of failure to warn the plaintiff of the concealed danger or trap in the instant case was specifically the failure by the third party and also by the defendant for seeing to it that there was no such failure, to give any warning signs in respect of the defective lift.

Such failure aforesaid of third party was in breach at least, of his contractual obligation to erect such warning signs etc. under clause 4 of the maintenance agreement of the lifts made between the defendant and the third party and *a fortiori* when in addition, the third party expressly agreed under clause 14 of the same to the effect to indemnify the defendant for damages for accidents at common law, the defendant was clearly entitled to indemnify from the third party in respect of the damages payable by the defendant to the plaintiff. The third party was also negligent, (quite apart from the breach of the said clause 4 of the said agreement), in respect of such failure in giving such warning signs, before the date of the accident, from the moment (like the defendant), it came to know or ought to know of the trap or hidden danger created by the defective lift notwithstanding the demoralizing delay by the defendant in approving the purchase order for the spare parts; *a fortiori* when it had in fact already received such approval about 8 days before the date of accident.

We therefore made the order mentioned earlier accordingly.